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6 EUREKA INVENTIONS, LLC,

7 Plaintiff,

8 No. C 15-00701 JSW

9 v.

10
11 **ORDER DENYING MOTION TO**
12 **TRANSFER VENUE**

13
14 BESTWAY (USA), INC., BESTWAY (HONG
15 KONG) INTERNATIONAL, LTD.,

16 Defendants.

17 Now before the Court for consideration is the motion to transfer venue, filed by
18 Defendants Bestway (USA), Inc. (“Bestway USA”) and Bestway (Hong Kong) International,
19 Ltd. (“Bestway Hong Kong”) (collectively “Bestway”). The Court has considered the parties’
20 papers, relevant legal authority, and the record in this case, and it finds the motion suitable for
21 disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). The Court VACATES the
22 hearing scheduled for June 19, 2015, and it HEREBY DENIES Bestway’s motion.

23
24 **BACKGROUND**

25 Plaintiff Eureka Inventions, LLC (“Eureka”) is located in San Francisco, California.
26 Eureka develops products for the toy industry. (Compl. ¶ 8.) Bestway USA’s offices are
27 located in Phoenix, Arizona. (Declaration of Patrizio Fumagalli (“Fumagalli Decl.”), ¶ 3.)¹ Mr.
28 Fumagalli is Bestway USA’s President and CEO, and his offices also are located in Phoenix,
Arizona. (*Id.*, ¶ 2.) Bestway Hong Kong’s principal offices are in Hong Kong.

¹ Bestway submitted Mr. Fumagalli’s declaration with its reply brief. Because Eureka has not filed any objections to this declaration, the Court has considered it.

1 In August 2013 and in June 2014, Eureka and Bestway entered into two license
2 agreements regarding children’s slides (the “Slide Agreement”) and 3D viewing systems for
3 above ground pools (the “Pool Agreement”) (collectively, the “License Agreements”). (*Id.*, ¶¶
4 9-11, Exs. A, B.) On February 13, 2015, Eureka filed this action for declaratory relief, because
5 of various disputes that have arisen relating to the License Agreements. (*Id.*, ¶¶ 10, 12.)

6 The Slide Agreement contains a “Governing Law” provision, in which Eureka and
7 Bestway “each consent to the venue and jurisdiction of any court located in Maricopa County
8 Arizona[.]” (Compl., Ex. A (Slide Agreement, ¶ 13).) The Governing Law provision in the
9 Pool Agreement provides, in pertinent part, that “[t]he parties each consent to the venue and
10 jurisdiction of any state or federal court located in Arizona. . . . This provision is permissive, not
11 mandatory, and each party reserves the right to bring any action, proceeding, or other matter
12 arising directly or indirectly hereunder against the other party wherever they might be found or
13 might otherwise be subject to jurisdiction.” (Compl., Ex. B (Pool Agreement, ¶ 21).)

14 The Court shall address additional facts as necessary in its analysis.

ANALYSIS

16 Bestway moves to transfer this action to the United States District Court for the District
17 of Arizona. Pursuant to 28 U.S.C. section 1404(a), a district court may transfer a civil action to
18 any district where the case could have been filed originally for the convenience of the parties
19 and witnesses and in the interest of justice.

20 A motion to transfer venue under section 1404(a) requires the court to weigh multiple
21 factors to determine whether transfer is appropriate in a particular case. For example, the court
22 may consider: (1) the plaintiff's choice of forum; (2) the convenience of witnesses and the
23 parties; (3) the familiarity of the forum with the applicable law; (4) the ease of access to
24 evidence; and (5) the relative court congestion and time of trial in each forum. *Gulf Oil Co. v.*
25 *Gilbert*, 330 U.S. 501, 508 -09 (1947); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99
26 (9th Cir. 2000). As the moving party, Bestway bears the burden of showing that the
27 inconvenience of litigating in this forum favors transfer. *See E. & J. Gallo Winery v. F. &*
28 *P.S.p.A.*, 899 F. Supp. 465, 466 (E.D. Cal. 1994) (noting that to meet this burden requires

1 production of affidavits or declarations identifying key witnesses and anticipated testimony).
2 The forum selection clauses in the License Agreements also are “significant” but not
3 “dispositive” factors in the Court’s analysis. *See, e.g., Jones v. GNC Franchising, Inc.*, 211
4 F.3d 495, 499 & n.20 (9th Cir. 2000). There is no dispute that Eureka could have sued Bestway
5 in Arizona. Accordingly, the Court weighs the relevant competing factors to determine which
6 forum is appropriate under the circumstances.

7 **A. Eureka’s Choice of Forum and the Forum Selection Clause.**

8 A court should give a plaintiff’s choice of forum great deference unless the defendant
9 can show that other factors of convenience clearly outweigh the plaintiff’s choice of forum.
10 *Decker Coal Co.*, 805 F.2d at 843. There are, however, factors that diminish the deference
11 given to a plaintiff’s choice of forum. For example, a court may give less deference to a
12 plaintiff’s chosen forum, if plaintiff has agreed to a particular forum by way of a forum
13 selection clause. *See, e.g., Unisys Corp. v. Access Corp., Ltd.*, 2005 WL 3157457, at *5 (N.D.
14 Cal. Nov. 23, 2005) (quoting *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3rd Cir. 1995)).

15 In the Ninth Circuit, “[t]he prevailing rule,” with regard to forum selection clauses is
16 “that where venue is specified with mandatory language the clause will be enforced.”
17 *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989); *see also Northern*
18 *Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th Cir.
19 1995) (“To be mandatory, a clause must contain language that clearly designates a forum as the
20 *exclusive* one.”) (emphasis added). Applying these principles, each of the forum selection
21 clauses at issue is permissive. Indeed, the Pool Agreement expressly contemplates that the
22 parties could file suit in a court outside of Arizona.

23 The deference accorded to a plaintiff’s chosen forum should be balanced against both
24 the extent of a defendant’s contacts with the chosen forum and a plaintiff’s contacts, including
25 those relating to a plaintiff’s cause of action. *Pacific Car and Foundry Co. v. Pence*, 403 F.2d
26 949, 954 (9th Cir. 1968). “If the operative facts have not occurred within the forum of original
27 selection and that forum has no particular interest in the parties or the subject matter, [a]
28 plaintiff’s choice is only entitled to minimal consideration.” *Id.*

1 Eureka is based in San Francisco, and it has submitted a declaration from Peter Sgromo,
2 its Lead Management Consultant, who states that he performed a number of services required
3 under the License Agreements in either San Francisco or Los Angeles. (Declaration of Peter
4 Sgromo (“Sgromo Decl.”), ¶¶ 1, 5.) Bestway in turn submits the Fumagalli declaration, in
5 which Mr. Fumagalli attests that services related to the License Agreements were performed in
6 Arizona and elsewhere. The Court has considered the impact of the forum selection clauses,
7 which do show that Eureka agreed that it would be convenient to litigate in Arizona. However,
8 in the Pool License Agreement, the parties expressly reserved the right to litigate elsewhere.

9 Therefore, notwithstanding the forum selection clauses, given Eureka’s connection to
10 the Northern District of California, and the fact that at least some of the services relating to the
11 License Agreements took place in San Francisco, the Court concludes that Eureka’s chosen
12 forum is entitled to some deference.

13 **B. Convenience of the Witnesses and Parties.**

14 In addition to considering Eureka’s choice of forum, the Court considers the relative
15 convenience to all the parties involved in the lawsuit of the competing forums when deciding a
16 motion to transfer. *Gulf Oil*, 330 U.S. at 508. The convenience of witnesses is often the most
17 important factor in resolving a motion to transfer. The trial court looks at who the witnesses
18 are, where they are located, and the relevance of their testimony. *A.J. Industries, Inc. v. United*
19 *States District Court*, 503 F.3d 384, 389 (9th Cir. 1974).

20 On reply, Bestway submitted evidence to show that several witnesses, who are Bestway
21 employees, reside Phoenix, Arizona. (Fumagalli Decl., ¶¶ 12-13.) According to Bestway, other
22 party-affiliated witnesses are located in Los Angeles or Hong Kong. (*Id.*) In contrast, Eureka
23 submits evidence that third party witnesses are located in San Francisco or Los Angeles. “[T]he
24 convenience of party witnesses is a factor to be considered[.]” *Saleh v. Titan Corp.*, 361 F.
25 Supp. 2d 1152, 1160 (S.D. Cal. 2005) (quoting *Aquatic Amusement Assocs. v. Walt Disney*
26 *World Co.*, 734 F. Supp. 54, 57 (N.D. N.Y. 1990)) (internal quotation marks omitted).
27 However, “the convenience of non-party witnesses is the more important factor.” *Id.* Further,
28 convenience of a litigant’s employee witnesses are entitled to little weight because litigants are

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1 able to compel their employees to testify at trial, regardless of forum. *See STX, Inc. v. Trik Stik,*
2 *Inc.*, 708 F. Supp. 1551, 1556 (N.D. Cal.1998). Based on the record, the convenience of the
3 witnesses and parties weighs against transfer.

4 **C. Familiarity of the Forum With the Applicable Law.**

5 The License Agreements provide that they are to be interpreted and construed in
6 accordance with Arizona law, although Bestway does not argue that there is any significant
7 difference between California and Arizona law on contracts. This factor weighs slightly in
8 favor of transfer.

9 **D. Ease of Access to Evidence.**

10 Access to sources of proof is another factor that favors transfer. *Gulf Oil*, 330 U.S. at
11 508. The parties present competing information about where documents relevant to the case are
12 located. Bestway *argues* that it would be required to produce large scale products, which are
13 located in Arizona, but it does not provide any evidence to support that argument. In addition,
14 “[w]ith technological advances in document storage and retrieval, transporting documents
15 generally does not create a burden.” *Van Slyke v. Capital One Bank*, 503 F. Supp. 2d 1353,
16 1362 (N.D. Cal. 2007). This factor weighs against transfer or, at best, is neutral.

17 **E. Relative Congestion.**

18 Another factor courts consider is the relative court congestion in each forum. Neither
19 party has presented evidence addressing this factor.

20 When the Court considers all of the factors, it concludes that they weigh against transfer.

21 **CONCLUSION**

22 For the foregoing reasons, the Court DENIES Bestway’s motion to transfer venue.

23 **IT IS SO ORDERED.**

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25 Dated: May 27, 2015

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JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE